

Calendar No. 6

82D CONGRESS }
1st Session }

SENATE

{ REPORT
No. 5

APPOINTMENT OF DEPUTY UNITED STATES MARSHALS

JANUARY 17 (legislative day, JANUARY 8), 1951.—Ordered to be printed

Mr. McCARRAN, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany S. 35]

The Committee on the Judiciary, to which was referred the bill (S. 35) to provide for the appointment of deputy United States marshals without regard to the provisions of the civil-service laws and regulations, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to amend section 542 of title 28, United States Code, so as to allow a United States marshal to appoint deputies with the approval of the Attorney General without regard to the provisions of the civil-service laws and regulations and to further provide for their removal with the approval of the Attorney General. Section 2 of the bill is to bring deputy marshals in office on the date of enactment of this bill under the provisions thereof.

STATEMENT

S. 35 is the same as S. 3993 of the Eighty-first Congress. S. 3993 was reported by the Committee on the Judiciary, United States Senate, and unanimously passed the Senate on August 23, 1950. The facts relative to the bill are contained in extracts from Senate Report 2287, Eighty-first Congress, second session, which are attached and made a part of this report.

By the act of November 26, 1940, 54 Stat. 1211, the President was given broad authority to cover positions in the executive departments and agencies into the classified civil service. Section 1 of the act (5 U. S. C., Sec. 631 (a)), provides:

"Notwithstanding any provisions of law to the contrary, the President is authorized by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government: *Provided*, That in the case of any federally owned and controlled corporation organized under the laws of any State, Territory, or possession of the United States, or the District of Columbia, the President is authorized to direct that such action be taken as will permit appointments to offices or positions in any such corporation to be made in accordance with the civil-service laws, consistently with the laws of any such State, Territory, or possession, or the District of Columbia, or with the charter or articles of incorporation of any such corporation: *Provided further*, That the provisions of this section shall not apply to offices or positions in the Tennessee Valley Authority or to any positions in the Work Projects Administration or to any position to which appointments are made by the President by and with the advice and consent of the Senate, or to positions of assistant United States district attorneys."

Thereafter, deputy marshals among others were apparently regarded as within the classified civil service. It will be noted that the above section definitely excepts the positions of assistant United States district attorneys.

The office of the United States attorney and the office of United States marshal, while in the executive branch of the Government, work closely in conjunction with the Federal judiciary. It might be said that, while the office of the United States attorney and the office of the United States marshal perform different functions, in other respects, they are of a similar nature. The United States attorney, as well as the United States marshal, is appointed by the President by and with the advice and consent of the Senate and is responsible for the conduct of the respective offices. The above section, as noted, specifically excepts an assistant to a United States attorney from the provisions of the Civil Service Act and apparently does so for the reason that the United States attorney, in whom the President and Senate have reposed confidence, should be able to choose, without regard to civil service regulations, such assistants as he may deem fit and proper for the position. Inasmuch as the United States attorney is solely responsible for the conduct of his office, such authority is believed proper.

As stated before, the office of the United States marshal is, in most respects, similar to that of the United States attorney, and, since the President and the Senate repose the same confidence in the United States marshal as is given to a United States attorney, the committee does not see why there should be any variance in the manner of appointment of deputies to the United States marshals. After consideration the committee is of the opinion that the bill S. 3993 is meritorious and recommend that the same be given favorable consideration.

Attached hereto and made a part hereof is a memorandum from the Legislative Reference Service, dated July 27, 1950, dealing with the general history of appointments of deputy United States marshals.

THE LIBRARY OF CONGRESS,
Washington 25, D. C., July 27, 1950.

To: Hon. Pat McCarran.

From: American Law Section, Legislative Reference Service.

Subject: Status of deputy marshals under civil service and draft of a bill removing them therefrom.

The first inquiry is for a statement showing how deputy United States marshals came to be placed under civil service.

In 39 Opinion Attorney General 115 (1937), the Attorney General was asked whether deputy marshals were within the phrase "officers and employees of any of the courts of the United States" as contained in the act of July 13, 1937 (50 Stat. 512). The Attorney General, after noting that *In re Neagle* (1890) (135 U. S. 1, 63), held that deputy marshals are within the executive branch of the government, said:

"I have found nothing to indicate that the Congress has regarded the United States attorneys or marshals or their subordinates as within the judicial branch. On the contrary, both the Congress and the Executive heretofore have evidenced acceptance of the view that such officers and employees are in the executive branch. The President, acting under authority conferred upon him by the civil service laws, long since extended those laws to 'all officers and employees in the executive civil

service of the United States,' with specified exceptions, expressly including under 'Department of Justice' positions in the offices of United States marshals and United States attorneys—and the Congress has acquiesced in this executive action, although enlarging the group of 'excepted positions' in the offices of United States marshals through providing in the act of October 22, 1913, (c. 32, 38 Stat. 208 (U. S. C., title 5, sec. 639)), that deputy marshals required to give bond may be appointed without regard to the civil service laws (27 Op. A. G. 95; 34 Op. A. G. 192; 35 Op. A. G. 413; Civil Service Rules, Rule II and Schedule A)."

The statute referred to by the Attorney General (5 U. S. C. sec. 639), provides as follows:

"* * * Any deputy collector of internal revenue or deputy marshal who may be required by law or by authority or direction of the collector of internal revenue or the United States marshal to execute a bond to the collector of internal revenue or United States marshal to secure faithful performance of official duty may be appointed by the said collector or marshal, who may require such bond without regard to the provisions of an Act of Congress, entitled 'An Act to regulate and improve the civil service of the United States,' approved January sixteenth, eighteen hundred and eighty-three, and amendments thereto, or any rule or regulation made in pursuance thereof, and the officer requiring said bond shall have power to revoke the appointment of any subordinate officer or employee and appoint his successor at his discretion without regard to the Act, amendments, rules, or regulations aforesaid."

Prior to the passage of this statutory provision on October 22, 1913, the status of deputy marshals under the civil-service laws appears to have followed a varied course. Without attempting to recount all changes, it may be noted that in 1908 deputies were excepted, at least with regard to appointment, by Schedule A, IV, Rule 2, of the Civil Service Rules (see (1908) 27 Op. Atty. Gen. 95). Later, however, they appear to have been brought within the scope of the law (see (1928) 35 Op. Atty. Gen. 413), discussing the case of one George O. White appointed November 9, 1910, "after competitive examination." See also *U. S. v. Lapp* ((C. C. A. 6th, 1917) 244 Fed. 376). But after the enactment of the statute embodied in 5 United States Code, section 639, a deputy marshal was clearly subject to appointment and removal by the marshal solely at his discretion (*U. S. v. Lapp, supra*). And as late as 1939 the Civil Service Commission regarded deputy marshals who might be required by law or by direction of the marshal to execute a bond to be excepted by the statute from the provisions of the civil-service laws. See the Commission's Civil Service Act and Rules, Statutes, Executive Orders and Regulations (June 30, 1939) 106, 112.

However, by the act of November 26, 1940, 54 Stat. 1211, the President was given broad authority to cover positions in the executive departments and agencies into the classified civil service. Section 1 of the act (5 U. S. C. section 631a) provides:

"Notwithstanding any provisions of law to the contrary, the President is authorized by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government: *Provided*, That in the case of any federally owned and controlled corporation organized under the laws of any State, Territory, or possession of the United States, or the District of Columbia, the President is authorized to direct that such action be taken as will permit appointments to offices or positions in any such corporation to be made in accordance with the civil-service laws, consistently with the laws of any such State, Territory, or possession, or the District of Columbia, or with the charter or articles of incorporation of any such corporation: *Provided further*, That the provisions of this section shall not apply to offices or positions in the Tennessee Valley Authority or to any positions in the Work Projects Administration or to any position to which appointments are made by the President by and with the advice and consent of the Senate, or to positions of assistant United States district attorney."

Accordingly, by Executive Order No. 8743, April 23, 1941 (6 Fed. Reg. 2117) as amended, it was provided among other things that all offices and positions in the executive civil service of the United States except (1) those that were temporary, (2) those expressly excepted from the provisions of section 1 of the act of November 26, 1940, (3) those excepted from the classified civil service under Schedules A and B of the Civil Service Rules, and (4) those which then had a classified status, were thereby covered into the classified civil service of the Government. Thereafter, deputy marshals among others were apparently regarded as within the classified civil service. See Civil Service Commission, Civil Service Act and Rules, Statutes, Executive Orders and Regulations (Novem-

ber 30, 1941) 11, 148; Civil Service Act, Rules and Regulations Annotated (1943) 211, 212-214, 224.

When the Judicial Code was revised and re-enacted as permanent law effective in 1948 (28 U. S. C., sec. 542), was framed to read as follows:

"The Attorney General may authorize any United States marshal to appoint deputies and clerical assistants. Deputy marshals shall be subject to removal by the marshal pursuant to civil-service regulations."

The reviser's note to this provision states (H. Rept. No. 308 on H. R. 3214, 80th Cong., 1st sess. (1947) A66): "Deputies are now members of the civil service and removable only in accordance with civil-service regulations thereof. All references to removal by Attorney General or the district court are omitted from the revised section. There seem to have been no removals of deputy marshals by district courts in the last 25 years."

Since the above history indicates that the inclusion of deputy marshals in the civil service was a matter of long development, rather than resulting from special action at one time with regard to such officers alone, we have found no statement of reasons why such officers should be covered by the civil service.

In accordance with your request for "a draft of a bill to take deputy United States marshals out from under civil service, and let the marshals appoint their own deputies," the following is suggested:

BILL To confer upon United States marshals discretionary authority to appoint and remove deputy marshals without regard to civil-service laws or regulations

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28, United States Code, section 542, is hereby amended to read as follows:

"The Attorney General may authorize any United States marshal to appoint deputies and clerical assistants. Deputy marshals shall be subject to appointment and removal by the marshal without regard to civil-service laws or regulations."

It may be noted in this connection that it seems to be beyond question that Congress can make exceptions of this sort. (See (1908) 26 Op. Atty. Gen. 502, 507.)

ROBERT S. OGLEBAY,
American Law Section.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE, PART 2, CHAPTER 33, SECTION 542

SEC. 542. Appointment and tenure of deputies and assistants.

[The Attorney General may authorize any United States marshal to appoint deputies and clerical assistants. Deputy marshals shall be subject to removal by the marshal pursuant to civil-service regulations.]

The Attorney General may authorize any United States marshal to appoint clerical assistants. Any United States marshal may appoint deputies, with the approval of the Attorney General, and without regard to the provisions of the civil-service laws and regulations. Deputy marshals shall be subject to removal by the marshal with the approval of the Attorney General.

Sec. 2. Deputy marshals in office upon the date of enactment of this Act shall be subject to removal by the United States marshal, under whom they serve, with the approval of the Attorney General, and without regard to the provisions of the civil-service laws and regulations.

